No. 79-552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MITSUI & CO., LTD., ET AL.,
Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mitsui & Co., Ltd., and Mitsui & Co. (U.S.A.), Inc., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* at 1a) is reported at 594 F.2d 48. The opinion of the district court (App. B, *infra,* at 18a) is reported only at 1978-1 Trade Cas. ¶ 62,130.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1979 (App. C, *infra,* at 25a). A timely petition for rehearing, with suggestion of rehearing *en banc,* was denied on July 6, 1979 (App. D, *infra,* at 27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Act of State Doctrine permits a court of the United States to inquire into conduct of the Indonesian government for the purpose of determining the actual reasons and motives for official acts that precluded respondents, as a matter of law, from entering into a logging business on state-owned forests of Indonesia.[1]

STATEMENT

This lawsuit has its origin in the unsuccessful efforts by respondents, an American corporation and its two Hong Kong corporate subsidiaries, to obtain permission from the government of Indonesia to conduct a logging business in the province of Kalimantan.[2]

Indonesia's Foreign Capital Investment Act of 1967 makes ownership or co-ownership by an Indonesian entity a prerequisite to the conduct of a forestry operation on state-owned land. Foreign corporations that desire to operate in Indonesia can do so only by participating with a local firm in a joint venture approved by the government.

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[1] If the Court concludes that the Act of State Doctrine prohibits such judicial inquiry and determination, the Court therefore should dismiss respondents' antitrust claim in its entirety. *See* n. 8, *infra.*

[2] The case arises on motion for summary judgment. Except where otherwise noted, the statement of facts is taken from the opinions of the district court and the court of appeals.

In addition, since the state owns the nation's forest resources, no company can conduct a logging business on state-owned land until the government has issued it both a logging concession and a cutting license.

In 1970, P. T. Telaga Mas Kalimantan Co. ("Telaga Mas"), an Indonesian corporation, and Forest Products Corporation ("Forest Products"), the predecessor of respondent Industrial Investment Development Corporation, signed a joint venture agreement for the establishment of a logging business on certain designated state-owned land in Kalimantan. The Indonesian government approved the joint venture by entering into a three-party forestry agreement with Telaga Mas and Forest Products on July 1, 1971. The forestry agreement required the formation of a new Indonesian corporation (never formed in fact) to conduct the business of the joint venture, and the agreement further prescribed that such business could not begin unless and until a logging concession and cutting license were issued by the government.

Telaga Mas and Forest Products jointly applied for a concession and license, but while the application was pending a dispute arose among the shareholders of Telaga Mas. One group of shareholders opposed, and another supported, the joint venture with Forest Products. The group opposing the joint venture obtained judicial decrees from Indonesian courts affirming that group's right to control Telaga Mas and holding that the joint venture agreement was void. The Indonesian government then withdrew its approval of the joint venture by cancelling the forestry agreement. Respondents subsequently obtained a judgment invalidating the earlier decree that had voided the joint venture agreement, but the Indonesian government nevertheless refused to reinstate its approval of the joint venture

and also decided not to issue a logging concession or cutting license to the joint venture, but issued them instead to Telaga Mas alone.

After the Indonesian government had withdrawn its approval of the joint venture, respondents instituted this action in the United States District Court for the Southern District of Texas, charging that Telaga Mas and petitioners, a Japanese corporation and its American corporate subsidiary, had conspired in violation of American antitrust laws to prevent respondents from establishing the logging business pursuant to the joint venture agreement.[3] Respondents allege that petitioners fomented and encouraged the dispute among the shareholders of Telaga Mas, with the ultimate consequence that Forest Products lost the ability to enter and compete in the Indonesian lumber market. Respondents seek treble damages of approximately $195 million for the loss of profits that they allegedly would have derived from the operation of the logging business.[4]

The district court dismissed respondents' complaint on the ground that adjudication of their antitrust claim was barred by the Act of State Doctrine.[5] The district court determined that the direct cause of respondents' alleged injury was the Indonesian government's withdrawal of

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[3] The jurisdiction of the district court was invoked under the general federal question statute, 28 U.S.C. § 1331. In particular, respondents seek damages as provided by § 4 of the Clayton Act, 15 U.S.C. § 15, for alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and § 73 of the Wilson Tariff Act, 15 U.S.C. § 8. Respondents also allege diversity of citizenship jurisdiction under 28 U.S.C. § 1332 and assert pendent claims based upon state law.

[4] Second Amended Complaint, ¶¶ 59 and 60. Respondents seek an additional $130 million in damages pursuant to their nonfederal claims. *Id.*, ¶¶ 61 and 63.

[5] The claims based upon state law were dismissed on jurisdictional grounds.

its approval of the joint venture and refusal to issue a logging concession or cutting license. The court reasoned that to prove the fact of antitrust damage, essential under section 4 of the Clayton Act, respondents would be required to show that those acts of the Indonesian government had been induced by the alleged concerted acts of petitioners and Telaga Mas. Citing *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), the court ruled that the Act of State Doctrine does not permit such inquiry into the reasons or motives that may have induced the Indonesian government to act:

> [Respondents] contend that the poisoning of the [Forest Products]-Telaga Mas joint venture caused the cancellation of the Three Way Agreement which in turn caused the government to deny [Forest Products] a concession. It is this two step inquiry which is prohibited by the act of state doctrine. Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind that act, no matter how unscrupulous, is beyond judicial review. . . .
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> . . . .
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> [Respondents] had cleared a major hurdle in the forming of the three part agreement. However, this was only the beginning and despite any great expectations of the parties involved, the delivery of the concession was still vulnerable to the whim of a foreign government. No guarantees were made. The forming of the three party agreement created no privileges in the land. In fact the continuity of the three party agreement was conditional on the granting of a concession. The government was at liberty at all times to grant or deny such a privilege. The motivation for their [*sic*] ultimate denial cannot be the basis of an antitrust suit pursuant to American laws.

App. B, *infra*, at 21a, 24a.

The United States Court of Appeals for the Fifth Circuit reversed, with one judge dissenting. Recognizing that under *Hunt* v. *Mobil Oil Corp.* proof of substantial damages would require a showing that the Indonesian government would have issued the necessary logging concession and cutting license *but for* the alleged conspiracy, the court acknowledged that such a showing could not have been made if the case had been brought in the Second Circuit. The court, however, explicitly rejected the *Hunt* decision and held that inquiry could be made into the reasons and motives underlying the Indonesian government's decisions to withdraw approval of the joint venture, to refuse to reinstate such approval, and to withhold issuance of the necessary logging concession and cutting license:

> . . . [T]he *Hunt* opinion broadly states that in order to prove damages an antitrust plaintiff must show that *but for* the conspiracy the foreign government would not have acted as it did. This, the court continues, requires an inquiry into the motivation of the foreign state and 'that inevitably involves its validity.' 550 F.2d at 77.
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> . . . [W]e disagree that motivation and validity are equally protected by the act of state rubric. . . . Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action.

App. A, *infra*, at 15a-17a (emphasis in original).

Judge Jones, dissenting, stated:

> The district court's decision as succinctly and accurately stated in the majority opinion, is 'that the dam-

> age complained of stems directly from the denial of the government concession to cut timber.' I am like minded. If the statement be true then the Act of State doctrine requires a dismissal of the action.

App. A, *infra,* at 17a.

REASONS FOR GRANTING REVIEW

1. The holding below, that courts of the United States may inquire into and determine the extent to which a foreign government's official acts may have been induced or caused by alleged antitrust violations, is in conflict with the recent decisions of the Second and Ninth Circuits in *Hunt* v. *Mobil Oil Corp.* and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.* and is inconsistent with the principles that this Court enunciated in *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347 (1909). By departing from established precedent, the court of appeals has created substantial confusion and uncertainty concerning an important question of federal law that previously had been regarded as settled. This Court should grant review in order to resolve the conflict among the circuits and to clarify the scope and proper application of the Act of State Doctrine in cases where, as here, the basis for a foreign government's official acts has been called into question.[6]

Whether American courts may inquire into and determine the reasons and motives underlying a foreign government's official acts is a question of substantial importance

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[6] When *Hunt* was pending on petition for a writ of certiorari, this Court invited the Solicitor General to file a brief *amicus curiae* stating the views of the United States. 432 U.S. 904 (1977). The Solicitor General advised the Court that it should take the case to decide "the important issue whether the act of state doctrine bars judicial examination of the motives behind a foreign government's official acts." Brief for the United States as Amicus Curiae, at 7 (No. 76-1403).

both to the conduct of this nation's foreign policy and to the administration of the antitrust laws. American corporations engage in widespread business activities throughout the world, and foreign governments have assumed an ever-expanding role as regulators of and participants in such activities. It is apparent and inevitable that private antitrust actions arising from international business activities will increasingly implicate the official acts of foreign states. In view of the decision below, the lower courts stand in need of this Court's guidance concerning whether they are free to scrutinize the wisdom, integrity, motivation, or propriety of such official acts.

2. In this case, respondents seek almost $200 million for the loss of profits that they allegedly would have derived from the joint operation of a logging business with Telaga Mas in Indonesia. As the court of appeals itself observed, respondents cannot recover damages for such lost profits without first showing that the Indonesian government would have allowed them to conduct the proposed logging business *but for* petitioners' alleged wrongdoing: "Plaintiffs must show a causal relationship between defendants' anticompetitive actions and the harm suffered." App. A, *infra*, at 16a.[7] Accordingly, in order to establish their case, respondents must prove that petitioners' actions, and not respondents' lack of business acumen or political, economic, or any other factors, were the cause of or reason for the government's withdrawal of approval of the joint venture, its refusal to reinstate that approval, and its failure to issue the necessary logging concession and cutting

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[7] *See also, e.g.*, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (recoveries may be had only for injuries that are "the certain result of the wrong"); M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc., 517 F.2d 1059, 1064 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976) ("damages are recoverable only upon a showing that absent the anticompetitive practice plaintiff would not have suffered the loss").

license.[8] As the court of appeals recognized, adjudication of this factual issue of causation would require a thorough inquiry into the reasons or motives underlying the Indonesian government's aforementioned acts of state.

It is precisely this type of judicial inquiry that the courts in *Hunt* and *Occidental Petroleum* held to be barred by the Act of State Doctrine. The factual issue in *Hunt* was whether the defendants' alleged wrongdoing had induced or caused the government of Libya to nationalize the plaintiffs' petroleum properties in that country. 550 F.2d at 72.[9] The Second Circuit, in a carefully reasoned opinion, determined that the Act of State Doctrine precluded the examination into the motives of the Libyan government that would be required to resolve that issue. Similarly, in *Occidental Petroleum* the Ninth Circuit concluded

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[8] The court of appeals apparently believed that respondents may be able to prove they suffered injury upon the collapse of the joint venture between Forest Products and Telaga Mas, even apart from the alleged loss of profits. App. A, *infra*, at 13a-14a. But since the joint venture had no business purpose other than the establishment of the proposed logging operations in the particular concession area in question (*see, e.g.*, R. Doc. No. 28), the joint venture had no value apart from the profits to be derived from those particular proposed operations. Proof that petitioners' alleged wrongdoing was the proximate cause of the failure to reap profits therefore is not merely necessary to the recovery of substantial damages, it is a prerequisite to the recovery of any damages at all.

[9] The plaintiffs in *Hunt*, like respondents here, asserted that their injury was independent, and in advance, of any act of state:

> The complaint alleges only that private companies conspired against Hunt. They caused Hunt to take actions based upon assurances and promises that were made to be broken. They damaged Hunt wholly apart from the nationalization, and if the final coup de grace was administered by Libya, it was because of the manner in which respondents manipulated the conduct — not of the Libyan government — but of their fellow signatories. . . .

Petition for a Writ of Certiorari in *Hunt*, at 24-25 (No. 76-1403).

that the Doctrine barred inquiry into the question whether allegedly unlawful actions of the defendants had caused the ruler of Umm al Qaywayn to cancel or suspend a petroleum drilling concession that he had earlier granted to the plaintiffs.[10] These decisions plainly are at odds with the holding below. Indeed, although the court of appeals in this case sought to distinguish *Occidental Petroleum*,[11] it openly disagreed with and rejected *Hunt*. App. A, *infra*, at 16a-17a.[12]

In deciding *Hunt* and *Occidental Petroleum*, the Second and Ninth Circuits correctly drew substantial support from this Court's decision in *American Banana Co.* v. *United Fruit Co.* In that case, the plaintiff alleged that its property had been seized and sold by the government of Costa Rica as a result of the defendant's unlawful actions. This Court held that the courts of the United States lack power to determine that a foreign act of state was improperly or unlawfully induced:

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[10] The relevant facts in *Occidental Petroleum* are set forth in that district court's opinion. 331 F. Supp. at 99-101.

[11] The court attempted to distinguish *Occidental Petroleum* as a case "where plaintiffs' asserted claim arose through rights granted by a foreign government." App. A, *infra*, at 13a. But the fact that *Occidental Petroleum* involved the suspension or cancellation of a privilege, whereas this case involves the refusal to extend or perfect a privilege in the first place, affords no basis for treating the two cases differently under the Act of State Doctrine.

[12] Although *Hunt* involved an expropriation of property that had been the occasion for official comment by the Department of State, the court of appeals below correctly recognized that the cases are basically the same "[d]espite these distinctions." App. A, *infra*, at 15a. The Second Circuit itself stated that its holding in *Hunt* would have been the same "[e]ven if the Department of State had not spoken." 550 F.2d at 78. And for purposes of the Act of State Doctrine, there can be no significant difference between a foreign state's expropriation of a firm's property and its refusal to permit a firm to engage in business: Both the taking of property and the exclusion from the marketplace constitute official acts of the foreign state.

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.

213 U.S. at 358.[13] It follows that there is no room for judicial inquiry into the question of inducement at all.

3. Even apart from *American Banana, Hunt,* and *Occidental Petroleum,* it is clear that the court of appeals below erred in its application of the Act of State Doctrine.[14] That doctrine is grounded in the concern that judicial examination of foreign acts of state may affront or embarrass the foreign sovereign and thereby frustrate or interfere with this nation's conduct of foreign policy. *See, e.g., First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S.

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[13] The Court further held that this nation's antitrust laws do not reach private acts committed outside the United States, a holding that has not withstood the test of time. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962). But "the holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant." *Occidental Petroleum,* 331 F. Supp. at 110. *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (citing *American Banana* with approval as a case involving the Act of State Doctrine).

[14] The Indonesian government's withdrawal of approval of the joint venture, its refusal to reinstate that approval, and its failure to issue a logging concession and a cutting license were discretionary official acts implicating that nation's public interests. As the Chairman of the Indonesian Foreign Investment Board has explained, the dispute in this case "directly concerns the interest of the State in the form of a forest area which is strictly necessary to be protected." R. Doc. No. 68. It therefore is clear that the acts at issue were acts of state.

759, 765-68 (1972) (plurality opinion). The rationale of the Act of State Doctrine therefore is not confined merely to judicial determinations of the validity of the foreign act of state. Judicial inquiry into the actual reasons or motives underlying an act of state carries with it an equal if not greater potential for affronting or embarrassing the foreign sovereign. Such an inquiry, which calls into question the wisdom, judgment, probity, and consistency of foreign officials, may be considerably more disturbing to the foreign sovereign, and considerably more disruptive of foreign policy, than a simple declaration that, for example, the foreign act of state does not comport with western concepts of international law. *Cf. Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. at 428-30.[15]

Moreover, it is apparent that the distinction drawn by the court of appeals between validity and motivation is wholly artificial.[16] Since official acts that have been procured by fraud or that have no basis in reason, for example, may be unenforceable under local or international law, the

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[15] Since the inquiry into motivation itself creates a serious risk of affront or embarrassment, it makes no difference under the Act of State Doctrine why the inquiry is undertaken. In particular, the considerations underlying the Act of State Doctrine operate with equal force irrespective of whether the judicial examination of a foreign act of state be made to establish the fact, or only the amount, of a defendant's liability. The court of appeals' unexplained suggestion to the contrary, App. A, *infra,* at 13a, 17a, appears plainly incorrect.

[16] Even the seminal Act of State case, Underhill v. Hernandez, 168 U.S. 250, 252 (1897), speaks not of "validity" but against our courts' "sit[ting] in judgment" on the acts of a foreign state. The most recent Act of State opinion by this Court, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694 n. 10 (1976), interprets *Underhill* as speaking to the "propriety" of foreign governmental acts, not their "validity."

motivation of an act of state obviously bears upon its validity.[17]

For all these reasons, the court of appeals was wrong to restrict the operation of the Act of State Doctrine solely to cases where the validity of a foreign official act is in question. The Doctrine operates more broadly to prevent American courts from "challeng[ing] the *sovereignty* of another nation, the *wisdom* of its policy, or the *integrity* and *motivation* of its action." *Timberlane Lumber Co.* v. *Bank of America,* 549 F.2d 597, 607 (9th Cir. 1977) (emphasis added).

The real issue in any case involving a foreign act of state is not whether the act is valid but, rather, whether the act is to be accepted as a postulate for resolution of the dispute between the parties. On that point, this Court has spoken plainly and forcefully: "When it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud* v. *American Metal Co.,* 246 U.S. 304,

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[17] The Second Circuit in *Hunt* reached the same conclusion:

> However, while the skilled pleader here has meticulously attempted to avoid the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity.
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> . . . [W]e cannot logically separate Libya's motivation from the validity of its seizure. The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

550 F.2d at 77.

309 (1918).[18] It follows that, in this case, the denial of a logging concession and a cutting license and other related acts by the government of Indonesia, and respondents' consequent legal disability, must be taken as a predicate for decision. The government of Indonesia by its acts foreclosed any legal interest that respondents might otherwise have had in conducting a logging business in that country. Under the Act of State Doctrine, therefore, as a matter of law respondents cannot recover directly or indirectly for the loss of profits that they allegedly would have derived from such a business.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[18] *See also* Underhill v. Hernandez, 168 U.S. at 252; Occidental of Umm al Qaywayn v. A Certain Cargo, 577 F.2d 1196, 1202 n. 10 (5th Cir. 1978), *cert. denied* ..... U.S. ....., 99 S.Ct. 2857 (1979).

APPENDIX A

OPINION

Of the

United States Court of Appeals
For the Fifth Circuit

April 25, 1979

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD., AND FOREST PRODUCTS CORPORATION, LTD.,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD., AND MITSUI & CO. (U.S.A.), INC.
Defendants-Appellees.

No. 78-1775

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

APRIL 25, 1979

Fitzhugh H. Pannill, Jr., R. Hayden Burns, Houston, Tex., for plaintiffs-appellants.

Fulbright & Jaworski, B. J. Bradshaw, Rufus Wallingford, Jerry E. Smith, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, CLARK and INGRAHAM, Circuit Judges.

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CHARLES CLARK, Circuit Judge:

The sole issue in this appeal is whether the act of state doctrine precludes a trial of plantiffs' antitrust action.[1] Plaintiffs claim damages from Mitsui & Co., Ltd., a Japanese corporation, and its American subsidiary, Mitsui & Co. (U.S.A.), Inc., for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 & 2, and Section 73 of the Wilson Tariff Act, 15 U.S.C.A. § 8. The complaint appended state law claims of tortious interference with contractual relations against these defendants and a breach of contract charge against the Indonesian defendant, P. T. Telaga Mas Kalimantan Co. Following extensive discovery, the district court granted defendants' motion for summary judgment. Defendants urged their motion on five grounds: (1) plaintiffs lack standing since they have incurred only derivative damage as shareholders; (2) the extraterritorial reach of American antitrust laws cannot grasp this case; (3) plaintiffs are not within the "target area" of antitrust law protection; (4) forum non conveniens; (5) act of state doctrine. The district court's decision was based solely on the ground that the act of state doctrine prevented judicial review of the federal claims.[2] Because of its ruling on federal claims, the district court exercised its discretion to dismiss the pendent state claims.[3]

The district court's invocation of the act of state doctrine

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[1] The named plaintiffs in this action are Industrial Investment Development Corporation (an American Corporation) and its two Hong Kong corporate subsidiaries, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd. They are collectively referred to as Industrial Investment or plaintiffs throughout this opinion.

[2] We express no opinion on the merits of assertions (1)-(4).

[3] Plaintiffs argue that independent diversity jurisdiction exists for the state claims. Because we find the federal claims justiciable, we need not resolve the dispute over the proper interpretation of the federal diversity statute, 28 U.S.C.A. § 1332.

in this case was in error. Although the regulations of a foreign state, Indonesia, formed part of the background to the activities alleged, neither the validity of those regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability for conduct which might prove to be prohibited by our antitrust laws.

The present dispute evolves from plaintiffs' desire to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. Late in the 1960's, the government of Indonesia began developing a plan for encouraging and regulating foreign private capital investment. The consequent Foreign Capital Investment Act provided for restrictions of private investment in certain fields, required the development of Indonesian manpower, and required opportunities for Indonesian co-ownership. Thus a foreign company could not conduct business within that country until it joined with a local company, and they together organized an independent limited liability company under Indonesian law. Known as P.T.'s (Perseroan Terbatas), these companies, which are closely analogous to American corporations, must have their organization approved by the government before they become effective.

Land use is also subject to regulation under the Act. A properly organized P.T. cannot harvest timber from the state-controlled land until it has been granted a concession and cutting license by the Department of Forestry pursuant to an application for forestry exploitation rights. The procedure contemplates preliminary surveys and negotiations between the applicant and the Director General of Forestry resulting in tentative concession rights embodied in a Forestry Agreement. The Agreement, accompanied by an

Application Letter drafted by the P.T., is then to be submitted to the Minister of Agriculture within one month. Delay in submitting the Application Letter is considered grounds for revoking the Forestry Agreement. The Agreement and Letter must be channeled through the Department. Following approval and payment of a concession fee, the Director General of Forestry issues a formal concession decree and a license which establishes the new company and authorizes its logging operations, subject to revocation for failure to carry out its obligations under the Forestry Agreement. Harvesting cannot begin until the license has been issued.[4]

In 1970 Industrial Investment[5] signed a joint venture agreement with Telaga Mas to harvest logs from a timber concession which had been granted to Telaga Mas in a government forest in Borneo. Under the agreement, Industrial Investment was to provide equipment, capital requirements and management, and supervisory and technical personnel. In exchange, Telaga Mas expressly agreed to cooperate in obtaining the necessary approvals for establishing the P.T. and securing the formal concession decree and cutting license.

Throughout the first six months of 1971 plaintiffs and Telaga Mas jointly negotiated with the Indonesian government for its approval of the proposed business. As a result, a Forestry Agreement was signed by the two companies and the Director General of Forestry on July 1, 1971. The Agreement set forth the capital, organization, and

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[4] *See generally*, Republic of Indonesia, *Invest in Indonesia* (January 1972).

[5] Forest Products Corporation of Delaware, a predecessor company of Industrial Investment, conducted the initial negotiations. For clarity we refer to the American company as Industrial Investment throughout.

administrative requirements to be completed by the two firms before payment of the concession fee to the government and issuance of the cutting license to the newly formed P.T. The Agreement also contained provisions relating to the operation of the joint concession. More importantly, it reserved to the Department of Forestry the right to cancel for failure of the joint venture partners to cooperate or carry out their duties, and provided that cancellation of the joint venture agreement prior to the issuance of the license certificate would automatically terminate any rights of the parties to conduct lumbering operations. No license ever issued.

The district court refused to consider plaintiffs' allegations of a Sherman Act conspiracy since in its opinion the absence of an authorizing license governed the disposition of the case. Plaintiffs allege that the Mitsui defendants infiltrated and usurped control of the Telaga Mas management for the purpose of destroying plaintiffs' interest in the proposed logging concession. The complaint intricately details a plot, spawned from a 1972 increase in the price of timber, in which the Mitsui companies, past purchasers and creditors of Telaga Mas, decided first to eliminate Industrial Investment and then to protect its competitive edge by secretly taking direct supervision and control of the Telaga Mas operations for its own profit. Implementation of the scheme began when a shareholder group led by Harianto, a Telaga Mas official who was secretly backed by Mitsui, challenged the authority of Telaga Mas official [*sic*], Sadjarwo, to execute the Forestry Agreement on behalf of Telaga Mas. Separate competing shareholder meetings were held by Harianto and Sadjarwo, each affirming the corporate authority of the leader of its respective faction. Eventually an Indonesian court declared Harianto's group to

be properly in power and nullified the joint venture agreement.

When the news reached the Director General of Forestry, he sent a letter to plaintiffs and to Telaga Mas in which he "cancelled and affirmed invalid" the Forestry Agreement. In the same letter, he invited plaintiffs and Telaga Mas under its newly declared leadership to execute a new agreement. The cancellation, plaintiffs argue, was the natural operation of the Agreement's automatic termination provisions.

In a separate action, a second Indonesian court subsequently held that Industrial Investment was not bound by the nullification order since it was not a party to that action. Harianto continued to rule Telaga Mas, however, and refused to honor or participate in the joint venture with plaintiff.

Industrial Investment contends that defendants' poisoning of the joint venture caused the cancellation of the Forestry Agreement which in turn caused the government to deny the concession. The district court found that the act of state doctrine prohibited such a "two-step inquiry." It concluded: "Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind the act, no matter how unscrupulous, is beyond judicial review."

The act of state doctrine has arisen as a means of determining the appropriateness of adjudicating in a United States court a dispute which in some manner involves a foreign government. As classically stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

Underhill v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

Early application of this doctrine was often muddled with the doctrine of sovereign immunity or principles of conflicts of law.[6] Since *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), however, the doctrine has emerged as independently based on concerns of separation of powers. The *Sabbatino* Court, cautious of judicial interference in executive affairs, refused to adjudicate the validity of expropriation by the Cuban government of property within its own territory owned by American nationals.[7] Its decision was based on several factors which pointed to the executive branch as the more appropriate tribunal to deal with the sensitive political issues. All related [*sic*] to the possible adverse consequences of an American court [*sic*] attempting to resolve the validity of title to property not within its jurisdiction

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[6] In *Underhill*, for instance, the defendant Hernandez was acting as an agent for the sovereign [*sic*] in which the alleged torts occurred. Thus the result could be said to rest on the personal immunity of foreign sovereigns. *Note*, The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978). *See Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). *See also, Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 705 n. 18, 96 S.Ct. 1854, 1866-67 n. 18, 48 L.Ed.2d 301 (1976). There is some authority that the doctrine still reflects conflicts of laws principles. This position assumes the validity of a foreign state's acts under the laws of that state. Applying the foreign laws to those acts, therefore, precludes an inquiry by American courts into their validity. See Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977).

[7] Although *Sabbatino's* bar against claims based on the asserted invalidity of Cuban confiscations has been legislatively overruled by the "Hickenlooper Amendment," Foreign Assistance Act § 301(d)(4), 22 U.S.C.A. § 2370(e)(2) (1970), the case is still the leading authority on the act of state doctrine.

or to judge a foreign state's power to expropriate the property of aliens. Of significance is the Court's express refusal to lay down "an inflexible and all-encompassing rule" of judicial abstention in every case not totally isolated to this country. 376 U.S. at 428, 84 S.Ct. at 940. Instead, it declared a less brittle doctrine, one with the "capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U.S. at 427-28, 84 S.Ct. at 940. Relying on traditional political question reasoning, it found that the doctrine was not constitutionally compelled but that it rested on "'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." 376 U.S. at 423, 84 S.Ct. at 938.[8] *Sabbatino's* "proper distribution" depended on several factors, which concerned the ramifications of judicial intervention on executive conduct of international relations or of inconsistent judicial and executive behavior.

The Supreme Court has recently reaffirmed this policy of balancing executive and judicial concerns in *Alfred Dunhill of London* v. *Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Because the Court "decline[d] to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations," *Dunhill* has become known as the "commercial

[8] Recently this circuit refused to rule on an act of state defense in a suit presenting conflicting claims to oil extracted from the *Persian Gulf. Occ. of Umm al Qaywayn* v. *A Certain Cargo,* 577 F.2d 1196 (5th Cir. 1978). Because the action required a determination of sovereignty over the well area, the case was dismissed as a non-justiciable political question. In a brief discussion of the source of the act of state doctrine, we noted that the "better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive." 577 F.2d at 1200-01 n. 4.

exception" to the act of state doctrine. Dunhill had mistakenly made an overpayment to Cuba for cigars purchased from expropriated cigar businesses. The Court permitted adjudication of his claim of debt against Cuba:

> [S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. . . . Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. at 703-04, 96 S.Ct. at 1866 (footnote omitted). Industrial Investment has urged application of this "commercial exception" to the Indonesian licensing structure. We need not reach the merits of this contention.[9]

Situations have arisen in which the Supreme Court has found the involvement of a foreign state to be too insignificant to invoke the act of state doctrine. For instance, the instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts. In *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1926), a conspiracy which affected United States commerce was held not to be immune from judicial review

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[9] A majority of the Court never supported a broad "commercial act" exception to the act of state doctrine. Justice Stevens specifically omitted this part in his concurrence to Justice White's majority opinion, and it was rejected by the four dissenters. However, the Second Circuit, at least in dictum, has treated a commercial exception as firmly established. *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed. 2d 477 (1977). *See* Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions, 46 Fordham L.Rev. 295 (1977).

of Sherman Act claims even though its success was due in part to procurement of discriminatory foreign legislation. The Court distinguished an earlier antitrust case, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), in which the act of state doctrine was held to bar adjudication of claims that defendants had influenced Costa Rica to seize plaintiff's property. *American Banana* also held that the Sherman Act could not be applied against conspiracies occurring outside this country. That latter rule of law has been repudiated. Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *United States* v. *Sisal Sales Corp.*, *supra*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042; *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

The conspiracy in *American Banana* took place outside the United States and resulted in Costa Rica's seizure of plaintiff's property there. The seizure was valid in costa [*sic*] Rica and the Court held that its validity could not be challenged in American courts. The *Sisal* conspiracy, by comparison, allegedly destroyed plaintiff's sisal exportation business, not by government expropriation, but by the American corporate defendants' takeover aided by foreign legislation. The *Sisal* Court was not interested in the validity of the legislation but was concerned with redressing the anticompetitive effects on American commerce caused by the conspiracy.

Similarly, a stage fortuitously set by existing foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade. In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), defendants were charged

with conspiring to monopolize the American vanadium industry by currying the favor of a private Canadian corporation designated as exclusive purchasing agent of vanadium by the Canadian government. Drawing from the authority of *Sisal,* the Court rejected the defense that the Canadian law permitted discriminatory purchasing by the authority having power to designate purchasing agents. It was enough that plaintiff claimed that the loss of its business was caused by defendants' actions. The Court was careful to note that the Canadian government itself was not a defendant in the action and that the validity of its legislation was not in issue.

The participation of the Indonesian government in the context of the present analysis cannot prevent Industrial Investment from having its claims adjudicated by the district court. There are no special political factors which outbalance this country's legitimate interest in regulating anticompetitive activity both here and abroad.[10] As in *Sisal* and *Continental Ore,* the complaint charges parties subject to the court's jurisdiction with conduct occurring within this country and elsewhere which violates United States law. To determine whether there has been a violation of American antitrust law it is not necessary to resolve the propriety of Indonesia's failure to issue a cutting license. To protect American antitrust policies, an American court

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[10] In cases dealing with the enforcement of antitust laws in the face of state action, we note that the approach of the courts has been to weigh the relative interests of the state and federal governments to determine whether the anticompetitive harm of the activity outweighs the benefits of state regulation. *Bates* v. *State Bar of Ariz.,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Parker* v. *Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

need not embark on an adjudication of the validity of that government's behavior. The Ninth Circuit recently stated:

> The touchstone of *Sabbatino* — the potential for interference with our foreign relations — is the crucial element in determining whether deference should be accorded in any given case. We wish to avoid "passing on the validity" of foreign acts. *Sabbatino,* 376 U.S. at 423, 84 S.Ct. 923. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino, id.* at 428, 84 S.Ct. at 940, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

Timberlane Lumber Co. v. *Bank of America,* 549 F.2d 597, 607 (9th Cir. 1976).

The government of Indonesia is not a named co-conspirator here. Its right to withhold a cutting license is not questioned. This is the major factor distinguishing this case from right-to-ownership cases such as *American Banana* and *Sabbatino.* For instance, in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.,* 331 F.Supp. 92 (D.C. Cal.1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), the plaintiffs, holders of a Middle East oil concession from one of the Trucial States, charged the defendants with inducing an adjacent sheikdom in the Persian Gulf, Sharjah, to grant them a conflicting concession covering the same area. The court invoked the act of state doctrine to avoid having to adjudicate which of the two competing sheikdoms had superior authority to grant the concession. It was found that, to establish their claim as pleaded, plaintiffs had to prove that Sharja's [*sic*] concession was fraudulently issued. Passing upon such foreign governmental acts was considered more appropriate for the executive branch in

its handling of foreign relations. By comparison, resolution of the charges made by Industrial Investment does not require a determination of plaintiffs' right to receive a cutting license from the Indonesian government. Unlike *Occidental* where plaintiffs' asserted claim arose through rights granted by a foreign government, Industrial Investment's interest in its business venture with Telaga Mas may be protected from disruptive conduct of competitors by United States antitrust laws.

The only connection which the government of Indonesia has with this action is through application of its Foreign Investment Act, the validity of which is not questioned. The challenge is that a commercial endeavor failed by virtue of external disruptive forces acting on the contractual relationship between private citizens. We need not decide whether, had Telaga Mas not refused to cooperate, the license would have issued as a certainty. It is enough that plaintiffs have offered proof to show that defendants conspired to cause its potential to exploit the Borneo concession to die aborning. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *H & B Equipment Co., Inc.* v. *International Harvester*, 577 F.2d 239 (5th Cir. 1978); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). Whether the Indonesian government would have issued a cutting license is relevant only to the value of the destroyed joint venture, not to liability for its destruction.

But the Mitsui defendants argue (and the district court agreed) that the damage complained of stems directly from the denial of the government concession to cut timber. In order to establish therefore that defendants' behavior

caused the injury, it would be necessary for the court to investigate the Director of Forestry's motivation in canceling the agreement. This they say amounts to a prohibited inquiry into the validity of governmental activity. However, plaintiffs' complaint does not limit their allegation of injury from the antitrust cause of action to the inability to harvest Indonesian timber. They assert: "The wrongful acts of Defendants and their co-conspirators have deprived it of its contract and concession rights, of its ability to enter and compete in the market, and of the profits it would have derived from such operations." They insist here that even before it was known whether a license would issue, these rights had a substantial value which they could have proven. Plaintiffs are entitled to recover damages for injury to these "business or property" interests if they are caused by antitrust violations. 15 U.S.C.A. § 15. All the injuries contended for may potentially satisfy that description. *North Texas Producers Association* v. *Young,* 308 F.2d 235 (1962), *cert. denied,* 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963). *See Hunt* v. *Mobil Oil Corp.,* 410 F.Supp. 10 (S.D.N.Y.1976), *rev'd on other grounds,* 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977).

The authority asserted to support Mitsui's position is *Hunt* v. *Mobil Oil Corp.,* 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.,* 331 F.Supp. 92 (C.D.Cal.1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972). Both cases involved expropriation by a foreign state of plaintiffs' properties. This distinction alone is of major significance. The *Hunt* court itself, refusing to apply the precedent of *Sisal,* stated:

> [*Sisal*] considered the assistance of the sovereign through the mechanism of favorable legislation engi-

> neered by the defendants to be of considerably less moment than the expropriation by the state of the plaintiffs' properties in [*American Banana*].

550 F.2d at 75. Furthermore, separation of powers consideration in *Hunt* strongly counselled against the court's interference.[11] Despite these distinctions, the *Hunt* opinion broadly states that in order to prove damages an antitrust plaintiff must show that *but for* the conspiracy the foreign government would not have acted as it did. This, the court continues, requires an inquiry into the motivation of the

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[11] The complaint by Hunt, an independent oil producer holding oil concessions in Libya, charged defendants, the seven major oil companies, with fraudulently inducing Hunt to be uncooperative in pricing negotiations with Libya. Hunt did so, and Libya retaliated by nationalizing Hunt's properties thus totally eliminating Hunt from the field of competition. Libya was incensed. It loudly proclaimed its purpose to give the United States "a big hard blow in the Arab area on its cold, insolent face." 550 F.2d at 73 *quoting* Statement of the State Department, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess., pt. 6, at 316-17 (1974). In response, the United States government wrote the Libyan government and characterized the expropriation as "political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya." 550 F.2d at 73, *quoting*, A. Rovine, Digest of United States Practice in International Law 1973 at 335. The Second Circuit refused to upset the executive's identification of Libya's motivation by another inquiry which "could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue." 550 F.2d at 77-78.

The court found that, even if the Department of State had not openly expressed its position, the political and diplomatic dimensions were too burdensome for resolution by the judiciary: "The action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." 550 F.2d 78. No such "implications and complications" hinder a resolution of Industrial Investment's antitrust claims here.

foreign state and "that inevitably involves its validity." 550 F.2d at 77.

This broad language in *Hunt* has been criticized for encouraging use of the act of state doctrine as a shield by private conspirators who are able to include some foreign governmental act in their anticompetitive scheme.[12] We do not agree that, in establishing a causal relation between the private violations alleged and the injuries suffered, the plaintiffs must prove that defendant's [*sic*] acts were the sole cause of the injury. Of course, plaintiffs must show a causal relationship between defendants' anticompetitive actions and the harm suffered. *Radiant Burners, Inc.* v. *Peoples Gas,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed2d 358 (1961). However, inquiry beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969); *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra,* 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544; *E & B* [*sic*] *Equipment Co., Inc.* v. *International Harvester, supra,* 577 F.2d 239; *Heatransfer* v. *Volkswagenwerk, A.G., supra,* 553 F.2d 964. Furthermore, we disagree that motivation and validity are equally protected by the act of state rubric. *See, e. g., Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* 370 U.S. 705, 82 S.Ct. 1404; *Timberlane Lumber Co.* v. *Bank of America supra,* 549 F.2d 597. Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to

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[12] Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977); Note, the Act of State Doctrine: Anti-Trust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978).

executive department action. Industrial Investment must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine.

The objective sought by passage of the Sherman Act is preservation and maintenance of effective competition in this country. *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). To provide an act of state shield to business entities whose activities happen to reach beyond United States soil would thwart this objective. The courts are an important forum for protection against competitive restraints. Although the act of state doctrine is a vital rule of judicial abstention in the field of foreign relations, it does not apply in this case.

REVERSED and REMANDED.

JONES, Circuit Judge, dissenting:

The district court's decision as succinctly and accurately stated in the majority opinion, is "that the damage complained of stems directly from the denial of the government concession to cut timber." I am like minded. If the statement be true then the Act of State doctrine requires a dismissal of the action.

APPENDIX B

OPINION
Of the
United States District Court
For the
Southern District of Texas

February 28, 1979

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INDUSTRIAL INVESTMENT DEVELOPMENT CORP., ET AL

V.

MITSUI & CO., LTD., ET AL

CIVIL ACTION No. 75-H-1041

Butler, Binion, Rice, Cook & Knapp (Louis Paine), Houston, Texas, and Austin, Arnett, Northrop, Kirkpatrick & Steber (Fitzhugh H. Pannill, Jr.), Houston, Texas, attorneys for Plaintiffs.

Fulbright & Jaworski (B. J. Bradshaw), Houston, Texas, attorneys for Defendants Mitsui & Co., Ltd. and Mitsui & Co. (U.S.A.), Inc.

FEBRUARY 28, 1978

MEMORANDUM AND ORDER:

This is an antitrust action brought in United States District Court to rectify alleged commercial mischief abroad. Defendants have moved to dismiss this action on five grounds:

(1) Plaintiffs lack standing since they have incurred only derivative damage as shareholders;

(2) The extraterritorial effect of American antitrust laws does not extend so far as to reach this case;

(3) Plaintiffs are not within the "target area" of protection afforded by the antitrust laws;

(4) Forum Non Conveniens;

(5) Act of state doctrine.

From a study of the pleadings, and with the benefit of seven volumes of exhibits accompanying the exhaustive briefs of parties, it is the opinion of this court that the act of state doctrine precludes judicial review of this case, therefore the other prongs of Defendants' motion need not be reached. Plaintiffs have also alleged claims of conversion, misappropriation, interference with contractual and business relationships, and breach of contract seeking to invoke pendent jurisdiction. There being no substantial federal claim, these other causes of action will also be dismissed for lack of jurisdiction.

The court has considered the mountainous stack of exhibits in reaching its decision, therefore it will give Rule 56, Fed.R.Civ.P., treatment to the Rule 12(b)(6) motion to dismiss. Although the granting of such motions in complex antitrust litigation is not favored, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962), the complexity of such litigation is often unnecessarily developed, and the court is convinced that there are no factual disputes in this case as to the few essential facts underpinning this decision. Those facts are as follows.

The American link on the Plaintiffs' side is Industrial Investment Development Corporation (IIDC), a Virginia corporation. IIDC is the beneficiary of a trust held by Lex LTD and Rex LTD. The corpus of the trust is the

Indonesia Industrial Investment Corporation Ltd. (IIIC), a Hong Kong corporation. IIIC wholly owns another Hong Kong corporation, Forest Products Corp. Ltd. (FPC) which is the principal actor in this Indonesian affair. These three corporations are the Plaintiffs in this suit.

Plaintiffs sought to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. The forests in Indonesia are owned by the Indonesian government. That government requires any foreign enterprise to form a joint venture with an Indonesian partner before it will be allowed to do business in Indonesia. This joint venture must then form an independent Indonesian corporation by which business must be conducted. However, the formation of these business alliances does not give anyone the right to begin the harvesting of the lumber. A concession or cutting license must be granted from the government through its Department of Forestry.

Pursuant to these governmental requirements, FPC entered into a joint venture with an Indonesian corporation, Telaga Mas Kalimantan Co. (Telega Mas). On July 1, 1971, FPC, Telaga Mas and the Indonesian Director General of Forestry entered into a Three Way Agreement by which terms were agreed upon as to the operating of the enterprise, *if* a cutting license were issued by the government. The Three Way Agreement provided for its own termination if no license issued. Ultimately no license was ever issued.

These facts are uncontroverted. Plaintiffs, however, would have the court shift its view from these facts to the more controversial allegations of conspiracy. Plaintiffs allege that the defendants infiltrated Telaga Mas executive suite [*sic*] and found a turncoat to poison the FPC-Telaga Mas marriage. Two shareholders meetings of Telaga Mas were

held. Regardless of their validity and fairness, it is undisputed that the first meeting ratified the Three Way Agreement while the latter invalidated the agreement. The battleground then switched to the Indonesian courts. The first two lawsuits upheld the validity of the second shareholders meeting and declared the Three Way Agreement unenforceable. The final lawsuit, however, resulted in a judgment that reversed the prior decision concerning the enforceability of the Three Way Agreement. In the meantime, the Director General of Forestry had cancelled the Three Way Agreement. Regardless of this cancellation and the ping-pong shareholders meetings and judgments, it is undisputed that a cutting license had never been and was never issued.

Plaintiffs contend that the poisoning of the FPC-Telaga Mas joint venture caused the cancellation of the Three Way Agreement which in turn caused the government to deny FPC a concession. It is this two step inquiry which is prohibited by the act of state doctrine. Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind that act, no matter how unscrupulous, is beyond judicial review. This is the precise reasoning behind *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), where it was stated:

> "Hunt's complaint does not name Libya as a defendant or in any way suggest that it is a co-conspirator of the named defendants. Nonetheless Judge Weinfeld reasoned that the combination or conspiracy charged did not of itself cause the damage complained of but rather that the damage resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally nationalizing its properties. Thus he found that Hunt would be required to establish that *but for* the conspiracy Libya would not have committed any of these aggressive actions. This he decided

> would require judicial inquiry into 'acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions.' 410 F.Supp. at 24. He concluded that this inquiry was foreclosed under the act of state doctrine."

Similarly, in *Occidental Petroleum Corp* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D.Cal. 1971), aff'd 461 F.2d 1261 (9th Cir. 1972), the court concluded that the foreign states' territorial aggressiveness which ousted the plaintiff from a concession was the ultimate cause of the damage complained of, and therefore was barred from judicial review stating:

> "There is, moreover, a further dimension to this case's implication of foreign acts of state. Because a private antitrust claim requires proof of damage resulting from forbidden conduct, e.g., Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742, 750-751 (9th Cir. 1936), cert. den. 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452 (1937); Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 & n.1 (9th Cir), cert.den., 382 U.S. 958 86 S.Ct. 433, 15 L.Ed.2d 362 (1965), plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, *inter alia,* that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island of Abu Musa at the behest of the defendants. Plaintiffs say they stand ready to prove the former allegation by use of 'internal documents.' But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert. *See Sabbatino, supra,* 376 U.S. at 423-424, 431-433, 84 S.Ct. 923."

Therefore, regardless of the proof offered by the Plaintiffs as to a conspiracy to break up the FPC-Telaga Mas joint venture, it is evident that the whole issue of such a conspiracy is irrelevant since the damage complained of stems directly from the denial of a governmental concession to cut timber. Any inquiry into the reasons for such denial is barred by the act of state doctrine. The recent U.S. Supreme Court case, *Alfred Dunhill of London* v. *Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854 (1976), does not help Plaintiffs' case. *Dunhill* merely excluded from the act of state doctrine those acts of a sovereign which are purely commercial in nature. The court reasoned:

> "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on national nerves." 96 S.Ct. at 1866.

The act in question here is the government denial of a concession to harvest logs which are owned by the government. This is not the type of act which *Dunhill* seeks to exclude as a purely commercial activity. Dunhill involved a plaintiff who paid funds to a Cuban government controlled corporation for the purchase of cigars. The cigar business was subsequently nationalized and the plaintiffs sued for the funds paid to the predecessor government controlled corporation. It was the failure to pay a commercial debt which the *Dunhill* court considered to be so entrepreneurial that the act of state doctrine would not apply. The same reasoning applies to *Timberlane Lbr. Co.* v. *Bank of America N.T. & S.A.,* 549 F.2d 597 (9th Cir. 1976), in which the act of state doctrine was not applied to an enforcement by Hondurian officials of a judicial decree by which commercial security interests held by defendants

were given recognition. It is the degree to which an American court must inquire into matters that turn on national political interests which triggers the act of state doctrine. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923 (1964). The denial of a concession to harvest government owned forests is a political, peculiarly governmental act of a sovereign. Perhaps the actions of the government in entering and terminating the Three Way Agreement may be considered commercial, proprietal acts, but the ultimate question as to the granting of the concession is purely a political issue barred from judicial review by the act of state doctrine.

The Plaintiffs had cleared a major hurdle in the forming of the three part agreement. However, this was only the beginning and despite any great expectations of the parties involved, the delivery of the concession was still vulnerable to the whim of a foreign government. No guarantees were made. The forming of the three party agreement created no privileges in the land. In fact the continuity of the three party agreement was conditional on the granting of a concession. The government was at liberty at all times to grant or deny such a privilege. The motivation for their ultimate denial cannot be the basis of an antitrust suit pursuant to American laws. Therefore, it is

ORDERED that Defendants' motion to dismiss construed as a motion for summary judgment is hereby GRANTED and Plaintiffs' complaint is in all things DISMISSED.

DONE at Houston, Texas, this 28th day of February, 1978.

/s/ Ross N. Sterling
United States District Judge

APPENDIX C

JUDGMENT

Of the
United States Court of Appeals
For the Fifth Circuit

April 25, 1979

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1775

D. C. Docket No. CA-75-H-1041

Industrial Investment Development Corporation, et al.,
Plaintiffs-Appellants,

v.

Mitsu & Co., Ltd. and
Mitsu & Co., (U.S.A.),
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before JONES, CLARK and INGRAHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

April 25, 1979

Jones, Circuit Judge, dissenting.

ISSUED AS MANDATE:

APPENDIX D

Notice of Order Denying Petition for Rehearing and Rehearing En Banc

July 6, 1979

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

JULY 6, 1979

Edward W. Wadsworth, Clerk
Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 78-1775 — INDUSTRIAL INVESTMENT DEVELOPMENT CORP., ET AL. VS. MITSUI & CO., LTD. AND MITSUI & CO., (U.S.A.)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule

35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.*

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk
By /s/ JULIE HARRISON
Deputy Clerk

cc: Mr. Fitzhugh H. Pannill, Jr.
Mr. B. J. Bradshaw
Mr. R. Hayden Burns

*Judge JONES dissents from the refusal of the panel to grant rehearing, for the reasons shown in his prior dissent.